

**Marked up version of legislation as amended by the *Acts  
Amendment (Lesbian and Gay Law Reform) Bill 2001***

## **ARTIFICIAL CONCEPTION ACT 1985**

**AN ACT relating to the status of persons conceived by artificial means and for related purposes.**

### **Commencement**

2.This Act shall come into operation on a day to be fixed by proclamation.

### **Interpretation**

3.(1)A reference in this Act to a married woman includes a reference to a woman who is living with a man as his de facto partner.

(2)A reference (however expressed) in this Act to the husband or wife of a person —

(a)

(a) is, in a case where the person is in a de facto relationship with a person of the opposite sex, a reference to the person's de facto partner; and

(b) does not, in that case, include a reference to the spouse (if any) to whom the person is actually married.

(3) In this Act —

**“artificial fertilisation procedure”** has the meaning given by the *Human Reproductive Technology Act 1991*.

### **Application**

4.(1)The provisions of this Act apply —

(a) in respect of an artificial fertilisation procedure carried out before or after the commencement of this Act either within or outside Western Australia; and

(b) in respect of a child born before or after the commencement of this Act either within or outside Western Australia.

(2)Nothing in this Act affects the vesting of property in possession or in interest before the commencement of this Act.

### **Rule relating to maternity**

5.(1)Where a woman undergoes an artificial fertilisation procedure in consequence of which she becomes pregnant and the ovum used for the purposes of the procedure was taken from some other woman, then for the purposes of the law of the State, the pregnant woman is the mother of any child born as a result of the pregnancy.

#### **Rule relating to paternity**

6.(1)Where a married woman undergoes, with the consent of her husband, an artificial fertilisation procedure in consequence of which she becomes pregnant, then for the purposes of the law of the State, the husband —

- (a) shall be conclusively presumed to have caused the pregnancy; and
- (b) is the father of any child born as a result of the pregnancy.

(2)In every case in which it is necessary to determine for the purposes of this section whether a husband consented to his wife undergoing an artificial fertilisation procedure, that consent shall be presumed, but the presumption is rebuttable.

#### **6A. Rule relating to parentage – same sex de facto relationships**

(1) Where a woman who is in a de facto relationship with another woman undergoes, with the consent of her de facto partner, an artificial fertilisation procedure in consequence of which she becomes pregnant, then for the purposes of the law of the State, the de facto partner of the pregnant woman –

- (a) shall be conclusively presumed to be a parent of the unborn child; and
- (b) is a parent of any child born as a result of the pregnancy.

(2) In every case in which it is necessary to determine for the purposes of this section whether a de facto partner consented to her de facto partner undergoing an artificial fertilisation procedure, that consent shall be presumed, but the presumption is rebuttable.

#### **Donor of genetic material**

7.(1)Where —

- (a) a woman becomes pregnant in consequence of an artificial fertilisation procedure; and
- (b) the ovum used for the purposes of the procedure was taken from some other woman,

then for the purposes of the law of the State, the woman from whom the ovum was taken is not the mother of any child born as a result of the pregnancy.

(2)Where —

- (a) a woman becomes pregnant in consequence of an artificial fertilisation procedure; and
- (b) a man (not being the woman's husband) produced sperm used for the purposes of the procedure,

then for the purposes of the law of the State, the man referred to in paragraph (b) —

- (c) shall be conclusively presumed not to have caused the pregnancy; and
- (d) is not the father of any child born as a result of the pregnancy.

# ***HUMAN REPRODUCTIVE TECHNOLOGY ACT 1991***

**AN ACT to establish the Western Australian Reproductive Technology Council; to require the compilation of a Code relating to the practice of, the procedures used in, and the ethics governing, human reproductive technology; to make provision with respect to the use of that technology in relation to artificially assisted human conception and for the regulation of certain research; and for related purposes.**

WHEREAS:

- A. In enacting this legislation Parliament is seeking to give help and encouragement to those eligible persons who wish to be parents.
- B. Parliament considers that the primary purpose and only justification for the creation of a human egg in the process of fertilisation or embryo *in vitro* is to assist persons who are unable to conceive children naturally due to medical reasons or whose children may be affected by a genetic abnormality or disease, to have children, and this legislation should respect the life created by this process by giving an egg in the process of fertilisation or an embryo all reasonable opportunities for implanting.
- C. Although Parliament recognises that research has enabled the development of current procedures and that certain non harmful research and diagnostic procedures upon an egg in the process of fertilisation or an embryo may be licit, it does not approve the creation of a human egg in the process of fertilisation or an embryo for a purpose other than the implantation in the body of a woman.
- D. Parliament considers the freezing and storage of a human egg in the process of fertilisation or an embryo to be acceptable only: —
  - (i) as a step in the process of implanting; and
  - (ii) only in extraordinary circumstances once the freezing and storage of eggs can be carried out successfully.

The Parliament of Western Australia enacts as follows:

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## **The Code and directions, generally**

**21.** Without limiting the generality of section 14 (1) (c), the Code, or directions, may make provision as to —

- (a) the criteria by which the appropriateness of a proposed artificial fertilisation procedure is to be assessed;
- (b) the means of determining and evaluating the considerations which should or may be taken into account before an artificial fertilisation procedure is commenced, including the diagnostic procedures involved;

- (c) the method by which, and the extent to which, donors or prospective donors of gametes, eggs in the process of fertilisation or embryos are to be assessed or selected;
- (d) the practice and procedures to be carried out in relation to the collection, keeping, use and disposal of gametes, eggs in the process of fertilisation or embryos, or for securing that such eggs or embryos are in a suitable condition for implantation;
- (e) the responsibilities of persons carrying out any procedures to which this Act applies;
- (f) the establishment of a basis for determining questions as to the control of, and the power to deal with or dispose of, gametes, eggs in the process of fertilisation or embryos;
- (g) the means of disposal, or prohibitions or restrictions in respect of the disposal, of gametes, eggs in the process of fertilisation or embryos;
- (h) limitations to be placed on the use of gametes, eggs in the process of fertilisation or embryos which may be donated by any one individual donor;
- (i) the means of identifying, for the purposes of sections 24 and 26, the person or persons on behalf of whom any gametes, egg in the process of fertilisation or embryo are stored, kept for implantation or developed which, in accordance with consents given, may be –
  - (i) a woman or man; or
  - (ii) a couple who are married, or in a defacto relationship with each other whether they are different sexes or both female;
- (j) the circumstances in which any egg in the process of fertilisation or embryo derived from the use of reproductive technology shall be allowed to succumb;
- (k) what, for the purposes of this Act, may constitute an authorized diagnostic procedure in relation to any egg in the process of fertilisation or an embryo or an approved project of research, or may be carried out or performed in any particular kind of research, and what shall not;
- (m) the assessment of applications seeking approval to carry out any project of research;
- (n) the requirement that prior approval of an Institutional Ethics Committee specified in, or ascertainable by reference to, those Rules, be a condition applicable to any particular practice, kind of practice or procedure or kind of procedure;
- (o) the making, retention and confidentiality of records; and
- (p) such other matters relating to the practice of reproductive technology as may be specified in, or are required by or to be carried out or determined in accordance with, the regulations.

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## When procedures may be carried out

23. An *in vitro* fertilisation procedure may be carried out where —

- (a) it would be likely to benefit —
  - (i) persons who, as a couple, are unable to conceive a child due to medical reasons;
  - (ia) a woman who is unable to conceive a child due to medical reasons; or
  - (ii) a couple or a woman whose child would otherwise be likely to be affected by a genetic abnormality or disease;
- (b) each of the participants required to do so has given an effective consent;
- (c) the persons seeking to be treated as members of a couple are —
  - (i) married to each other; or
  - (ii) in a de facto relationship with each other and are of the opposite sex to each other;
- (d) the reason for infertility is not age or some other cause prescribed for the purpose of this paragraph; and
- (e) consideration has been given to the welfare and interests of —
  - (i) the participants; and
  - (ii) any child likely to be born as a result of the procedure,and in the opinion of the licensee that consideration does not show any cause why the procedure should not be carried out,

but not otherwise.

## Storage

24.(1) In relation to the storage of any eggs, sperm, egg in the process of fertilisation or embryo —

- (a) the primary purpose stated in any consent to the storage of an egg in the process of fertilisation or any embryo must relate to the probable future implantation of that egg or embryo; and
- (b) the Code may make provision as to what, in particular circumstances, constitutes an excessive time for the storage of —
  - (i) eggs or sperm;
  - (ii) an egg in the process of fertilisation; or
  - (iii) an embryo,

but no egg in the process of fertilisation or embryo shall be stored for a period in excess of the permitted storage period except with the approval of the Council under subsection (1a).

(1a)The Council may approve in writing a longer storage period for an egg in the process of fertilisation or an embryo if it considers that there are special reasons for doing so in a particular case.

(1b)An approval under subsection (1a) may be subject to conditions and is to specify the date on which the longer storage period ends.

(1c)An approval under subsection (1a) can only be given before the end of the permitted storage period, or if a longer storage period has previously been approved under subsection (1a), before the end of that period.

(1d)The Council is to inform the Minister of each approval given under subsection (1a), but in such a manner that the identity of the biological parents cannot be ascertained from the approval.

(2)Where the person or persons on behalf of whom the storage of any gametes, egg in the process of fertilisation or embryo was undertaken have died, or the licensee otherwise does not have and can not obtain any instructions or consent required for the purposes of this Act in relation to the storage the control and the power of disposal are deemed to vest in the Commissioner of Health who shall, subject to section 22 (6) and any instructions or conditions to which effect may then be given, direct that any such egg or embryo be made available for the purpose of providing treatment for a specific recipient, unless a court of competent jurisdiction otherwise requires.

(3)Where a licensee is directed by the Commissioner to allow any gametes, egg in the process of fertilisation or embryo to succumb the licensee shall be required thereupon to comply and shall not be liable to any person for so doing.

(4)In this section —

“permitted storage period” means —

- (a) in the case of the storage of an egg in the process of fertilisation or embryo starting before 8 October 1993, the period ending 7 October 1996; and
- (b) in any other case, 3 years.

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### **Control, dealing and disposal in relation to an egg in the process of fertilisation or an embryo**

**26.(1)**In relation to rights to the control of, or power to deal with or dispose of, any egg in the process of fertilisation or embryo that is outside the body of a woman —

- (a) each person on whose behalf it is developed or is being, or is to be, kept for implantation has, subject to section 7 (1) (j), the right to decide how an egg in the process of fertilisation or embryo is to be dealt with or disposed of, so that —

- (i) such a person shall have, while storage continues, the right to review the decision to store from time to time and may withdraw consent or vary the terms of any consent; and
  - (ii) any question as to the nature or extent of the respective rights or powers may, subject to subsection (2), be referred to a court of competent jurisdiction;
- (b) in the event of the death of one member of a couple in whom the rights are vested, those rights vest solely in the survivor;
  - (c) where from any gametes an egg in the process of fertilisation or embryo is developed, whether or not with effective consent, the individual rights of a gamete provider or person to whom the gametes were provided and of a licensee cease at the moment fertilisation begins and the rights thereafter vest jointly in the couple on whose behalf that egg or embryo was developed; developed, or vest in the woman on whose behalf that egg or embryo was developed;
  - (d) where an egg in the process of fertilisation or an embryo has been developed on behalf of a couple or a woman and is no longer required for that purpose, if all the participants in a proposed procedure give an effective consent it may be donated for the purpose of providing treatment for a specific recipient; and
  - (e) on the commencement of an implantation procedure the rights in an egg in the process of fertilisation or in an embryo vest in the woman receiving it, whether or not —
    - (i) that recipient was eligible to undergo the procedure;
    - or
    - (ii) any consent required was given or, if given, was effective.

(2) Where rights in relation to an egg in the process of fertilisation or an embryo are vested in a couple and the couple disagree about its use or continued storage, the Commissioner of Health shall, on application by a member of that couple, direct the licensee storing the egg or embryo to ensure that the storage is maintained subject to —

- (a) payment of the proper charges of the licensee for the storage;
- (b) any limitation as to the time of storage prescribed or determined in accordance with section 24 (1) (b); and
- (c) any order made by a court of competent jurisdiction which otherwise requires.

## ***Interpretation Act 1984***

### **13A. References to de facto relationship and de facto partner**

- (1) A reference in a written law to a de facto relationship shall be construed as a reference to a relationship (other than a legal marriage) between 2 persons who live together in a marriage-like relationship.
- (2) The following factors are indicators of whether or not a de facto relationship exists between 2 persons, but are not essential —
  - (a) the length of the relationship between them;
  - (b) whether the 2 persons have resided together;
  - (c) the nature and extent of common residence;
  - (d) whether there is, or has been, a sexual relationship between them;
  - (e) the degree of financial dependence or interdependence, and any arrangements for financial support, between them;
  - (f) the ownership, use and acquisition of their property (including property they own individually);
  - (g) the degree of mutual commitment by them to a shared life;
  - (h) whether they care for and support children;
  - (i) the reputation, and public aspects, of the relationship between them.
- (3) It does not matter whether —
  - (a) the persons are different sexes or the same sex; or
  - (b) either of the persons is legally married to someone else or in another de facto relationship.
- (4) A reference in a written law to a de facto partner shall be construed as a reference to a person who lives, or where the context requires, has lived, in a de facto relationship.
- (5) The de facto partner of a person (the “**first person**”) is the person who lives, or lived, in the de facto relationship with the first person.

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